

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

LEVI V. WERNER ENTERS.

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GEORGIA L. LEVI, APPELLEE,
V.
WERNER ENTERPRISES AND DRIVERS MANAGEMENT, INC., APPELLANTS.

Filed March 23, 2010. No. A-09-1103.

Appeal from the Workers' Compensation Court. Affirmed.

Daniel R. Fridrich for appellants.

Jamie Gaylene Scholz, of Shasteen & Scholz, P.C., for appellee.

INBODY, Chief Judge, and SIEVERS and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Werner Enterprises and Drivers Management, Inc. (collectively Werner), appeal from a Nebraska Workers' Compensation Court review panel order affirming the trial judge's order which modified the original award and provided additional benefits to Georgia L. Levi. Werner's appeal focuses on the sufficiency of Levi's expert witness' written medical opinion to prove a change in Levi's incapacity was caused solely by the original work-related injury. Because we cannot say that the trial judge was clearly wrong in resolving adversely to Werner the factual issue presented by the expert's good faith self-contradiction, we affirm.

BACKGROUND

In November 2005, the trial judge awarded Levi temporary total disability benefits as a result of a work-related accident on May 17, 2003, that caused injuries to her neck, lower back, and left shoulder. Dr. David E. Tomaszek performed surgery on Levi in March and October 2006. In a September 2007 order modifying the 2005 award, the trial judge found that Levi

reached maximum medical improvement on March 27, 2007, and that she had suffered a 35-percent loss of earning power as a result of the 2003 accident.

Levi returned to Tomaszek in November 2007 with complaints of increasing back pain. In his medical notes, Tomaszek stated that, in contrast with earlier scans, a 2008 CT scan showed “left eccentric disk protrusions with facet overgrowth and bony spurring at both L4-5 and L5-S1, causing significant lateral recess stenosis at both levels.”

In a May 2008 letter, which is the critical evidence upon which Levi relied and which is now the focus of Werner’s appeal, Tomaszek stated:

On the surface, this degenerative change is a wear-and-tear issue. On the other hand, the rapid development and the rapid progression of this facet overgrowth and lateral stenosis are certainly in part related to . . . Levi’s original work injury, disk rupture, and surgery. Were it not for that original condition, her stenosis in my view would not have progressed to the symptomatic degree that it has, not to mention the rapid radiographic progression of her findings.

Therefore, her condition has materially changed. She is completely unable to work at the present time because of pain, cramping, numbness and weakness of the legs.

On May 20, 2008, Levi filed a petition to modify the award of November 2005, alleging that there had been a material and substantial change in her physical condition, that she had been completely taken off work by her primary treating surgeon, and that she was therefore entitled to an increase in her permanent partial disability benefits. Levi did not testify at the hearing on her petition, and instead, she offered into evidence exhibit 64, which consists of a copy of Tomaszek’s 2008 letter and medical notes containing the above findings. Werner opposed Levi’s claim for modification of the award, arguing that the language in Tomaszek’s letter failed to establish that the change in Levi’s condition was due solely to the May 2003 injury.

The trial court found that Tomaszek “squarely puts the material and substantial change in [Levi’s] physical condition on the work injury of May 17, 2003. [Werner’s] argument that [Levi’s] change in physical condition is not due solely to the injury of May 17, 2003, is without merit.” The trial court further noted that Tomaszek had taken Levi off work and that her loss of earning capacity had gone from 35 percent to 100 percent, a material and substantial change in Levi’s incapacity. The trial court determined that Levi was entitled to temporary total disability benefits beginning May 20, 2008.

The Workers’ Compensation Court review panel affirmed the trial court’s decision, and Werner has timely appealed to this court. Pursuant to this court’s authority under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument.

ASSIGNMENTS OF ERROR

Werner asserts, as summarized, that the Workers’ Compensation Court erred in awarding Levi temporary total disability benefits based on a finding that there had been a substantial change in her incapacity due solely to the accident of May 17, 2003.

STANDARD OF REVIEW

When reviewing a compensation award under Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a Workers’ Compensation Court decision

only when (1) the compensation court acted without power or exceeded its powers; (2) the judgment, order, or award was procured by fraud; (3) the record lacks sufficient competent evidence to warrant the making of the order, judgment, or award; or (4) the compensation court's factual findings do not support the order or award. *Risor v. Nebraska Boiler*, 277 Neb. 679, 765 N.W.2d 170 (2009). On appellate review of a workers' compensation award, the trial judge's factual findings have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Id.*

ANALYSIS

Werner asserts that the compensation court erred in holding that Levi's evidence was sufficient to support her claim of an increase in incapacity. Levi's claim for additional workers' compensation benefits relied upon Neb. Rev. Stat. § 48-141 (Reissue 2004), which provides:

[T]he amount of any agreement or award payable periodically may be modified as follows: (1) At any time by agreement of the parties with the approval of the Nebraska Workers' Compensation Court; or (2) if the parties cannot agree, then at any time after six months from the date of the agreement or award, an application may be made by either party on the ground of *increase or decrease of incapacity due solely to the injury*

....

(Emphasis supplied.) To obtain a modification, an applicant must prove, by a preponderance of evidence, that the increase or decrease in incapacity was due solely to the injury resulting from the original accident. *Hagelstein v. Swift-Eckrich*, 261 Neb. 305, 622 N.W.2d 663 (2001). In proving an increase in incapacity, "[t]he applicant must prove there exists a material and substantial change for the better or worse in the condition--a change in circumstances that justifies a modification, distinct and different from the condition for which the adjudication had previously been made." *Id.* at 308, 622 N.W.2d at 667.

Werner points to excerpts from Tomaszek's letter to support the argument that Levi had failed to prove that the increase in her incapacity was due solely to her prior work injury. Specifically, Werner believes that the statements that "[o]n the surface, this degenerative change is a wear-and-tear issue" and that the changes were "in part related to . . . Levi's original work injury" show that Tomaszek did not believe that the changes were solely related to the prior work injury, particularly in view of evidence that Levi was morbidly obese and had other health problems. Levi focused on the portion of Tomaszek's letter stating, "Were it not for that original condition, her stenosis in my view would not have progressed to the symptomatic degree that it has, not to mention the rapid radiographic progression of her findings. Therefore, her condition has materially changed."

It is apparent that the trial judge found Tomaszek's opinion to be credible and persuasive on the question of Levi's increased incapacity. The trial judge analyzed the language in the letter and concluded that Tomaszek "squarely puts the material and substantial change in [Levi's] physical condition on the work injury of May 17, 2003." In affirming the trial judge's award, the review panel noted that Levi had not been involved in any accidents since her original injury and stated that any contradiction in Tomaszek's opinion presented a question of fact to be resolved by the trial court.

We agree that any contradiction found in Tomaszek's opinion presented a question of fact, and under our standard of review, it necessarily follows that the trial judge's resolution of the question will not be disturbed unless clearly wrong. An expert witness' good faith self-contradiction presents a question of fact to be resolved by the Workers' Compensation Court. *Hohnstein v. W.C. Frank*, 237 Neb. 974, 468 N.W.2d 597 (1991). A finding upon review by the compensation court regarding whether an applicant's incapacity has increased under the terms of § 48-141 is a finding of fact. *Starks v. Cornhusker Packing Co.*, 254 Neb. 30, 573 N.W.2d 757 (1998). Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Bishop v. Specialty Fabricating Co.*, 277 Neb. 171, 760 N.W.2d 352 (2009). In light of the record before us, we cannot say that the trial judge was clearly wrong.

CONCLUSION

The review panel in the present case did not err in affirming the trial court's finding that Levi met her burden of proving, by a preponderance of the evidence, an increase in incapacity caused solely by her work-related injury. Accordingly, we affirm the judgment of the Nebraska Workers' Compensation Court.

AFFIRMED.